No. 14860

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

MICHAEL GLENN, A MINOR, BY AND THROUGH HIS GUARDIAN, AD LITEM, IDA MAE GLENN, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

REPLY BRIEF FOR APPELLANT

WARREN E. BURGER,
Assistant Attorney General.
LAUGHLIN E. WATERS,
United States Attorney.
PAUL A. SWEENEY,
MARCUS A. ROWDEN,
Attorneys,
Department of Justice, Washington, D. C.

CITATIONS

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1. Appellee, in its brief, strives to create the impression that a number of Federal courts have held that in suits against the United States "statutes of limitations are ordinarily tolled during the time plaintiff is prevented from suing because of legal disability or fraud of the defendant, even in the absence of express provision to this effect." Appellee's Brief, p. 8. A number of cases are set forth which purportedly embody that principle. Appellee's Brief, p. 8. Examination of those decisions, however, compels a contrary conclusion. Only three (*Sgambati* v. *United States,* 172 F. 2d 297 (C. A. 2) (1949), cer-

tiorari denied, 337 U. S. 938; *Osbourne* v. *United States,* 164 F. 2d 767 (C. A. 2) (1947); and *Kalil* v. *United States,* 107 F. Supp. 966 (E. D. N. Y.) (1952)) involved the Government as defendant. Of these three cases, *Sgambati* and *Kalil* deny disability extensions for lack of an express statutory provision. The third, *Osborne,* holds that there is one exception to the rule that in the absence of a specific disability provision, the limitations period in these statutes will not be tolled, and that is where there is physical impossibility of access to the courts such as might happen in wartime to foreigners, enemy aliens, or our own personnel who are prisoners of war. 164 F. 2d 767, 768–769. However, *Osbourne* recognizes that no such disability extensions can be judicially created for infancy. 164 F. 2d 767, 768.

The remaining cases cited by appellee (Brief, p. 8) all involve suits against private parties authorized by Federal statutes, principally the Federal Employers' Liability Act. Even in those cases, all but one court deny disability extensions for any reason since unauthorized by statute. The one exception is *Scarborough* v. *Atlantic Coast Line R. Co.,* 178 F. 2d 253 (C. A. 4), certiorari denied, 339 U. S. 919, discussed *infra,* pp. 7–8, in which the Fourth Circuit held that fraud would toll the running of the limitations period under the Federal Employers' Liability Act.

It is appellee's position, however, that irrespective of the actual decisions in those cases, their underlying rationale is as follows: If the time limit for bringing suit is a "substantive condition" of the right created by the statute in which the limitation is set forth,

then suit must be brought within that time period without regard to legal disabilities. However, if the time limitation is merely a qualification of the remedy, then a disability may toll the limitations period notwithstanding the absence of any express provision to that effect in the statute (Brief, pp. 8–10). Appellee argues that the limitations periods of such statutes as the Suits in Admiralty Act, Public Vessels Act, and Federal Employers' Liability Act come within the substantive class, whereas the limitations of the Tort Claims Act affect merely the remedy. Accordingly, he concludes, even absent an express disability provision, the limitations of the Tort Claims Act may be tolled for disability (Brief, p. 9).

The short answer to the foregoing is that the limitations of the Tort Claims Act, whether they be designated procedural or substantive, are jurisdictional, and must be rigorously adhered to by the courts. Extensions or exceptions must be found in the express language of the statute and are not to be created by implication. *Anderegg* v. *United States,* 171 F. 2d 127, 128 (C. A. 4) (1948), certiorari denied, 336 U. S. 967. See also, *Munro* v. *United States,* 303 U. S. 36, 41 (1938); *Finn* v. *United States,* 123 U. S. 227 (1887); *Edwards* v. *United States,* 163 F. 2d 268 (C. A. 9) (1947).

However, even pursuing appellee's theory, and accepting the distinction between limitations that condition the right and limitations that merely qualify the remedy, no different result is achieved. The limitations of the Tort Claims Act must be considered as

falling in the former class. Clearly they have none of the attributes of procedural time limitations. They need not be pleaded by the Government to be enforced by a court, and neither action nor neglect on the part of Government representatives can waive them. *Anderegg* v. *United States,* 171 F. 2d 127 (C. A. 4) (1948), certiorari denied, 336 U. S. 967; *De Bonis* v. *United States,* 103 F. Supp. 123, 126 (W. D. Pa.) (1952). Moreover, it is difficult to see how the rights created and the limitations placed thereon by the Tort Claims Act differ from the analogous rights and limitations of the Suits in Admiralty and Public Vessels Acts. Each of these Acts permits the bringing against the United States of actions sounding in tort. Each imposes a two-year limitation on the enforcement of those rights, and each contains no express disability exception to those limitations. In *Sgambati* v. *United States,* 172 F. 2d 297, certiorari denied, 337 U. S. 938, the Second Circuit refused to read disability exceptions into the limitations periods of the latter two Acts. The Tort Claims Act is in no different category.

Appellee places heavy reliance on Judge Yankwich's decision in *Sweet* v. *United States,* 71 F. Supp. 863 (S. D. Cal.), and the decision of the Fourth Circuit in *State of Maryland ex rel Burkhardt* v. *United States,* 165 F. 2d 869 (1947), to distinguish the Tort Claims Act from the other Acts insofar as the nature of the time limitations is concerned. This reliance, however, is misplaced. *Sweet* holds merely that the limitations period of the Tort Claims Act governs suits under that Act to the exclusion of whatever time limitations might be imposed by state law. The de-

cision assuredly did not hold that the Act's limitations are procedural rather than substantive. Judge Yankwich himself destroys any such notion in his paper before the Judicial Conference of the Ninth Circuit (June 28, 1949), *Problems Under The Federal Tort Claims Act,* published in 9 F. R. D. 143. After discussing his decision in *Sweet* and the Fourth Circuit's reliance on it in reaching the same conclusion in *Burkhardt, supra,* Judge Yankwich goes on to examine the nature of the time limitations of the Tort Claims Act and states (9 F. R. D. at 153):

> A note to the text [in the *Burkhardt* opinion] contains this observation:
>
> "It may be observed that the limitations in the Tort Claims Act is also imposed by the statute creating the cause of action; and if importance is to be attached to this distinction, it is a reasonable assumption that Congress intended the condition created by its own act to apply rather than one relating to the same subject matter contained in the State law." [165 F. 2d at p. 873.]
>
> The principle referred to is the familiar one that statutes of creation affect the right and not merely the remedy. From which it follows that the expiration of the period of limitation destroys the right. As said in a leading case:
>
> "The liability and the remedy are created by the same statutes, and *the limitations of the remedy are therefore to be treated as limitations of the right.*" The Harrisburg, 119 U. S. 199, 214 (1886). [Emphasis by Judge Yankwich.]
>
> And there is no jurisdiction to entertain the action after the expiration of the period within

> which it might have been brought. This because we are dealing *with a statute of creation* and not *with a statute of limitation* * * *. [Emphasis by Judge Yankwich.]

Accord in other Tort Claims Act suits: *United States* v. *W. H. Pollard Co., Inc.,* 124 F. Supp. 495, 497 (N. D. Cal. S. D.) (1954); *De Bonis* v. *United States,* 103 F. Supp. 119, 122 (W. D. Pa.) (1952).

Moreover, with respect to *Burkhardt,* the Fourth Circuit subsequently had the question of the nature of the limitations of the Tort Claims Act under consideration in *Anderegg* v. *United States,* 171 F. 2d 127 (1948), certiorari denied, 336 U. S. 967. After determining therein that the limitations of the Tort Claims Act must be strictly adhered to and may not be waived by action or neglect on the part of Governmental officers, *Anderegg* concluded (171 F. 2d at 128):

> Whether the limitation prescribed for suit by the Tort Claims Act be regarded as a condition of the right to sue or as a limitation upon the remedy would seem to be immaterial; but it should be noted that the limitation is imposed in the statute creating the right and the limitation in such case is ordinarily treated as a condition, as we pointed out in the note to *State of Maryland* v. *Burkhardt,* 4 Cir. 165 F. 2d, 869, 873.

Pursuit of appellee's own theory, therefore, fails to advance his cause—whether substantive, procedural, or jurisdictional, suit is precluded at the expiration of the two-year limitation period.

2. Appellee then shifts ground to argue that, irrespective of the substantive or procedural nature of

these limitations, extensions for disability may be granted by the courts. Reliance in this respect is placed on the decision of the Fourth Circuit in *Scarborough* v. *Atlantic Coast Line R. Co.,* 178 F. 2d 253 (1949), certiorari denied, 339 U. S. 919. There, in a suit under F. E. L. A., the court, rejecting the substantive-procedural differentiation, held that the limitations period would be tolled because the defendant fraudulently induced the plaintiff not to sue.

Scarborough, however, is inapplicable here. Initially, it was not a suit against the United States where principles of sovereign immunity are involved. Compare *Anderegg* v. *United States,* 171 F. 2d 127 (C. A. 4), certiorari denied, 336 U. S. 967, and cases cited *supra,* p. 3. Moreover, the *Scarborough* decision recognized such an exception for fraud only. The claimant in that case was a minor at the time his cause of action arose and forbore suit under the belief, fraudulently induced, that the limitations period was tolled until he reached his majority. The appellate court, however, did not hold the statute to be tolled on account of the plaintiff's infancy, but solely on the ground of defendant's fraud and the strong public policy against permitting a profit to its perpetrator. Finally, as recognized by the Fourth Circuit, even the exception injected by *Scarborough* is against the weight of authority in F. E. L. A. cases. 178 F. 2d at 257–258, and see cases cited in Appellant's opening brief, pp. 20–21, fn. 11.

The Fourth Circuit itself, in a recent decision, has indicated where it will draw the line in these cases. In *Williams, et al.* v. *United States, et al,* No. 6991 (C. A. 4),

decided December 16, 1955 (not reported as yet),[1] that court was faced with the contention that insanity tolled the two-year limitation of the Suits In Admiralty Act. In affirming the district court's rejection of that proposition (133 F. Supp. 317), the court of appeals stated:

> * * * The statute contains no saving clauses for disability of any kind. *Sgambati* v. *United States,* 172 F. (2d) 297, cert. denied 337 U. S. 938.
>
> Two exceptions to the rigid prevailing rule, that such statutes of limitations cannot be extended under any circumstances, have been carved out by our courts; in the prisoner of war situation, *Osbourne* v. *United States,* 164 F. (2d) 767; and in the fraud situation, *Scarborough* v. *Atlantic Coast Line R. Co.,* 4th Cir. 178 F. (2d) 253, cert. denied 339 U. S. 919. We are unimpressed with the argument that insanity likewise should toll this Statute of Limitations and we expressly hold that it does not. See, to like effect, *Kalil* v. *United States,* 107 F. Supp. 966, and also Judge Bryan's reasoning, 133 F. Supp. 318–319.[2]

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[1] Petition for certiorari pending, No. 549 Misc., United States Supreme Court, Oct. Term 1955.

[2] The district court opinion in *Williams*, 133 F. Supp. 317, makes the following observation (at p. 319):

> * * * An additional factor active here, but not present in the Scarborough case, is the immunity of the United States to suit. It holds the claimant to strict compliance with the very terms of the exceptive statute. The rigidity of the immunity is relaxed during the two years only. Indulgences for infancy or insanity are not a matter of right; nor does their absence invalidate the statute. Vance v. Vance, 1883, 108 U. S. 514, 521 * * *. Congress advisedly grants or withholds these tolerances. As witness: additional time for these contingencies is not accorded by the Federal Tort Claims Act, 28 U. S. C. A. §§ 1346, 2671 et seq., but it is allowed plaintiffs in the Court of Claims. 28 U. S. C. A. §§ 2404, 2501.

Accordingly, no sound basis exists for departing from previously established law. In the absence of an express disability provision, limitations on actions against the Government may not be tolled for infancy.

CONCLUSION

For the reasons stated above and in our main brief, it is respectfully submitted that the judgment of the district court should be reversed with directions to dismiss the action as non-timely.

WARREN E. BURGER,
Assistant Attorney General.
LAUGHLIN E. WATERS,
United States Attorney.
PAUL A. SWEENEY,
MARCUS A. ROWDEN,
Attorneys,
Department of Justice, Washington, D. C.

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